

JAN 27 1978

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-914

THE CITY OF INDEPENDENCE, MISSOURI, LYLE
W. ALBERG, CITY MANAGER, RICHARD A. KING,
MAYOR, CHARLES E. CORNELL, DR. RAY WIL-
LIAMSON, DR. DUANE HOLDER, RAY A. HEADY,
MITZI A. OVERMAN, AND E. LEE COMER, JR.,
MEMBERS OF THE COUNCIL OF THE CITY OF
INDEPENDENCE, MISSOURI,

Petitioners,

vs.

GEORGE D. OWEN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

QUESTIONS PRESENTED	1
RESPONDENT'S STATEMENT OF THE CASE	2
REASONS FOR DENYING WRIT—	
I. The Court of Appeals Properly Applied the Teachings of <i>Board of Regents v. Roth</i> and <i>Paul</i> <i>v. Davis</i>	5
II. Vicarious Liability Is Not an Issue	7
III. "Liberty" Issue Requires Only "Stigma" Aris- ing in the Course of Employee's Termination	9
IV. Owen's Federal Right to a Hearing Cannot Be Destroyed by Petitioners' Dubious Claim of Immunity Under State Law	10
CONCLUSION	11

Table of Authorities

<i>Birnbaum v. Trussell</i> , 371 F.2d 672 (2d Cir. 1966)	9
<i>Bishop v. Wood</i> , 426 U.S. 341 (1976)	5
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972)	5, 11
<i>Callahan v. Ingram</i> , 122 Mo. 355, 26 S.W. 1030 (1894)	10
<i>Cox v. Northern Virginia Transportation Commission</i> , 551 F.2d 555 (4th Cir. 1976)	8
<i>Greenhill v. Bailey</i> , 519 F.2d 5 (8th Cir. 1975)	9
<i>Hampton v. City of Chicago</i> , 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974)	10
<i>Karpelian v. Texas Women's University</i> , 509 F.2d 133 (5th Cir. 1975)	9
<i>Paul v. Davis</i> , 424 U.S. 693 (1976)	5, 6, 9
<i>Stewart v. Pearce</i> , 484 F.2d 1631 (9th Cir. 1973)	9
<i>Velger v. Cawley</i> , 525 F.2d 334 (2d Cir. 1975)	9
<i>Wellner v. Junior College</i> , 487 F.2d 153 (8th Cir. 1973)	9

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QUESTIONS PRESENTED

Petitioners' framing of the "Questions Presented" is improperly premised on an incorrect and incomplete statement of the facts as found by the Court of Appeals and petitioners seek to argue the non-existent issue of "vicarious liability" which is not supported by the facts, nor an issue below, nor a bar to relief.

Petitioners' "Questions Presented" (Petition, p. 2) are based on the erroneous assumption that the Court of Appeals held the city vicariously liable for slanderous statements of a single city councilman. In fact, the Court of Appeals granted relief against the city *because it failed to grant respondent a hearing* in which he could clear his name of the stigma resulting from charges made against him in the course of his discharge. These charges were made by a city councilman, approved by the city council by adoption of a formal motion and reinforced by the city manager. The statement and motion of the city councilman, the official adoption of the motion by The City Council and the actions of the city manager were widely publicized.

Respondent believes that the determinative issue is whether a city employee has a federal constitutional right to a hearing if the city's official actions publicly "blacken [his] name and reputation" (App. at 20a)¹ by stigmatizing charges in the course of his discharge.

RESPONDENT'S STATEMENT OF THE CASE

On and before April 18, 1972, respondent was employed as the chief of police of Independence. Under Section 3.3(1) of the city charter, he could be removed by the city manager only "when deemed necessary for the good of the service." (App. at 23a)

During a city council meeting on April 17, 1972, Paul Roberts, in his capacity as city councilman, read a written statement "impugning Owen's honesty and integrity." (App. at 22a) The statement alleged that Owen had mis-

1. References to "App." conform to those of the Petition for Certiorari. Appendix A is the opinion of the Court of Appeals and Appendix B is the opinion of the trial court.

appropriated police department property, that narcotics had "mysteriously" disappeared from his office, and that high ranking police officials had made "inappropriate" requests affecting the police court. It also alleged manipulation of traffic tickets, the "unusual release of felons" and the mysterious disappearance of money. As part of his statement, Roberts moved that certain "investigative reports" allegedly supporting the allegations be turned over to the prosecutor for presentation to the grand jury, that they be released to the press and that the city manager take "direct and appropriate action" against those "involved in illegal, wrongful, or gross inefficient activities."²

The city council by official action passed the motion with one abstention and no dissents, thus lending its support to Roberts' charges. (App. at 8a, 22a) The following day, the city manager discharged Owen.³ (App. at 18a) The discharge notice contained no reason for the discharge but stated simply that Owen was "[t]erminated under the provisions of Section 3.3(1) of the City Charter." (App. at 22a) The city manager reinforced the council's implication that Owen was guilty of wrongdoing by publicly announcing that he was referring the matter to the prosecutor for submission to the grand jury.⁴ (App. at 22a n. 11) He did not disavow the charges or the council's actions or take any steps to contradict reports that Owen's discharge was the direct result of the alleged misconduct.

2. The full text of the statement and motion is set out in petitioners' brief, pp. 3-4, footnote 1.

3. At an earlier time, the city manager had told the mayor. "I will do anything you can get four [out of seven] votes for." (Transcript at 46)

4. The grand jury eventually returned a "no true bill" but its deliberations were secret. The "investigative reports" were never released to the public so it never had the opportunity to make its own evaluation of whether they supported the charges against Owen. (App. at 30a)

The press and public were present at the April 17, 1972 city council meeting. (Transcript at 12, 49, 82 and 189) Copies of the statement and motion were distributed to them. The statement, motion and firing received widespread publicity. (App. at 22a) The area newspapers printed the statement and motion substantially verbatim and reported the adoption of the motion. Front page articles appeared for several days under headlines such as "Lid Off Probe, Council Seeks Action" (Independence Examiner, April 18, 1972, P.Ex. 5, Tr. 25); "Independence Accusation. Police Probe Demanded" (Kansas City Times, April 18, 1972, P.Ex. 6, Tr. 25); "Probe Culminates in Chief's Dismissal" (Independence Examiner, April 19, 1972, P.Ex. 13, Tr. 27) and "Police Probe Continues; Chief Ousted" (Community Observer, April 20, 1972, P.Ex. 14, Tr. 27). A copy of the statement and motion was placed in the city's permanent records. (Transcript at 81-82)

Owen's request for a hearing was denied by the city by letter dated May 3, 1972 from the city counselor's office. (App. 9a)

Owen brought suit under 42 U.S.C. §1983, and the Fourteenth Amendment asserting jurisdiction under 28 U.S.C. §1331, 28 U.S.C. §1343(3) and 28 U.S.C. §1343(4). He sought declaratory and equitable relief including a hearing on his discharge and back pay.⁵ The District Court entered judgment for defendants. (App. B)

On appeal, the United States Court of Appeals for the Eighth Circuit reversed, ordering the entry of a declaratory judgment that Owen's discharge had deprived him

5. Owen, who was 60 years old at the time of firing, was 64 by the time of trial. (Tr. 112) He withdrew his original prayer for reinstatement in light of the approach of the mandatory retirement age of 65.

of liberty without due process of law. In lieu of an award of full back pay, it ordered equitable compensation measured by the amount Owen would have earned to retirement if he had not been deprived of his good name by the actions of the city less mitigation. The Court of Appeals held that the District Court had jurisdiction under 28 U.S.C. §1331 to grant equitable relief for Owen's Fourteenth Amendment claims. The court found it unnecessary to decide whether, under 28 U.S.C. §1343 and 42 U.S.C. §1983, the District Court also had jurisdiction to grant equitable relief against the city officials in their official capacities. (App. at 14a)

REASONS FOR DENYING WRIT

I

The Court of Appeals Properly Applied the Teachings of *Board of Regents v. Roth* and *Paul v. Davis*

This case represents a routine application by the Court of Appeals of the teachings of *Board of Regents v. Roth*, 408 U.S. 564 (1972) and its progeny. Those cases established that a public employee has the right to a hearing to clear his name if he is discharged in a way which sullies his reputation, imposing on him a stigma which forecloses future employment possibilities. Since it is the public awareness of the stigmatizing allegations which damages the employee's good name, the charges must be public. *Bishop v. Wood*, 426 U.S. 341 (1976). And, since damage to reputation without accompanying loss of public employment does not deprive the employee of liberty, the public stigmatizing allegations must arise in the course of the employee's discharge. *Paul v. Davis*, 424 U.S. 693 (1976).

Petitioners do not and cannot question the Court of Appeals' finding that the charges were "obviously derogatory and stigmatizing." (App. 18a) Nor do they deny that the charges were made in a public city council meeting, were reprinted virtually verbatim in several newspapers and received widespread publicity on radio and television. Petitioners do appear to challenge the Court of Appeals' finding that the stigma was imposed "in the course of" and "connected with" Owen's discharge.⁶

The public disclosure of stigmatizing charges against Owen occurred in the course of his discharge. In a public city council meeting held April 17, 1972, a city councilman read a statement impugning Owen's honesty and integrity. (App. 22a) As part of the statement, the councilman moved that the results of the investigation be turned over to the prosecutor for presentation to the grand jury and that the city manager take "direct and appropriate action" against those involved in illegal, wrongful or gross (sic) inefficient activities.⁷ The city council approved the statement and motion, lending its support to the councilman's charges. (App. 22a) The following day, the city manager discharged Owen. He reinforced the implication of wrongdoing by publicly announcing that he was referring the matter to the prosecutor for submission to

6. They also make the purely semantic argument that the Court of Appeals' finding that the stigma was "connected with [Owen's] discharge" (App. at 22a) is insufficient to establish that the stigma arose "in the course of" the discharge. The Court of Appeals used the phrases interchangeably. (Compare, App. at 21a with App. at 22a) In *Paul*, this Court treated the phrases as equivalent, stating that defamation "unconnected with any refusal to rehire" was not actionable. *Paul v. Davis*, 424 U.S. 693, 709 (1976).

7. The complete text of the statement and motion is set out in the Petition for Certiorari, pp. 3-4, footnote 1.

the grand jury.⁸ (App. 22a at n. 11) His discharge notice to Owen did not disavow the allegations against Owen but stated that the discharge was authorized under a city charter provision permitting discharge "when deemed necessary for the good of the service." (App. 23a)

During the following days, the media widely reported the allegations against Owen, the council's action and Owen's discharge. Neither the council nor the manager denied reports linking the allegations to the firing.

Based on these facts, the Court of Appeals found that "The fact of actual stigma to Owen *connected with his discharge* is undeniable, for the action of the City of Independence as employer served to blacken Owen's name and reputation." (App. 22a) (Emphasis in the original) The fact that the unpublicized discharge notice, ignoring the circumstances in which it was made, did not directly refer to the allegations was found to be insufficient to cure the widely publicized and highly stigmatizing charges against Owen. The fact that the official who released the allegations to the press and public was not the same official who discharged Owen was held to be irrelevant. (App. 22a-23a)

II

Vicarious Liability Is Not an Issue

This case has nothing to do with vicarious liability. Owen does not seek to hold the city responsible through *respondeat superior* for defamation by a councilman. Rather, he seeks to hold the city responsible for its own failure to grant him a hearing regarding his discharge.

8. The grand jury's secret proceedings eventually resulted in a "no true bill". Those secret deliberations gave Owen no opportunity to refute the public charges against him. (App. 23a)

"The federal tort is the denial of a hearing at which the dismissed employee has an opportunity to refute the public charge." *Cox v. Northern Virginia Transportation Commission*, 551 F.2d 555, 558 (4th Cir. 1976).

Despite petitioners' allegations to the contrary (Petition, pp. 7-9), Owen would not require the city to censor the comments of its city councilmen nor to become an insurer against defamation by its employees. The city could have avoided all liability by granting him a hearing and an opportunity to refute the charges against him. The city may or may not have the power to prevent its councilmen from defaming city employees in the course of their discharge. It does have the power to grant the discharged employee a hearing once the defamation has occurred. It violates no principle of tort law to hold the city responsible for its failure to do so. The Transportation Commission in *Cox* perhaps had no power to prevent individual commissioners from making stigmatizing statements to the press. It did have the power and responsibility to give its employee an opportunity to clear her name once the commissioners had done so. The City of Independence had the same responsibility.

Petitioners claim that Owen had no right to a hearing because the city charter prohibited attempts by the city council to influence the hiring or firing decisions of the city manager. There is no authority or rationale for this position. Petitioners must admit that the city councilman was permitted to allege that Owen was engaged in wrongdoing. (In fact, petitioners allege that the councilman was absolutely privileged to do so. Petition, p. 11.) They do not suggest that the city manager was forbidden to discharge him if he believed those allegations to be true. There is nothing in the Independence City Charter which would prevent a citizen from concluding that Owen was

discharged because the city manager agreed with the stigmatizing allegations made and approved by the city council.

Moreover, the stigmatizing statement and motion were made. They were made in an official city council meeting which was open to the public. The council voted to approve them and made them a part of its official record. Copies were released to the press and public. The following day Owen was fired. Full reporting of the actions appeared in the major news media. If the statement and motion were improper under the charter, that did not make them any less stigmatizing. Moreover, as found by the Court of Appeals, it was not the council's actions alone which stigmatized Owen. The city manager himself reinforced the implications of wrongdoing. (App. 22a at n. 11)

III

"Liberty" Issue Requires Only "Stigma" Arising in the Course of Employee's Termination

The only nexus requirement is that the stigma arise "in the course of termination of employment", *Paul v. Davis*, supra. The stigmatizing acts may be by persons connected with the governmental employer other than the person who officially terminated the employee. *Wellner v. Junior College*, 487 F.2d 153 (8th Cir. 1973); *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975); *Birnbaum v. Trussell*, 371 F.2d 672 (2d Cir. 1966); *Stewart v. Pearce*, 484 F.2d 1631 (9th Cir. 1973). The stigma need not be specifically stated in the official notice of termination. *Velger v. Cawley*, 525 F.2d 334 (2d Cir. 1975).

Karpelian v. Texas Women's University, 509 F.2d 133, 139 (5th Cir. 1975) stated the rule as "Nor is it doubtful that such a one who is subjected to defacing public charges

in or as a result of the discharge process is entitled to a due process hearing at which he may make a fair fight to clear his name." (Emphasis added)

The constitutional right of procedural due process "because of what government is doing" to a person's "liberty" would be totally destroyed if the series here of related events can be compartmentalized and viewed as totally separate and unrelated.

IV

Owen's Federal Right to a Hearing Cannot Be Destroyed by Petitioners' Dubious Claim of Immunity Under State Law

Petitioners claim that the city council members are immune under state law from suits for slander and, therefore, that the city is immune from suits under federal law for its failure to grant a hearing and an opportunity to reply to the slander. As the Court of Appeals stated, "The short answer to this contention is that this case presents a federal question in which state law does not control." (App. at 17a) See also, *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974). Moreover, petitioners' claim of immunity under state law is highly questionable. It is based on the language of a decision decided in 1894 in which the court *rejected* the councilman's claim of immunity. *Callahan v. Ingram*, 122 Mo. 355, 26 S.W. 1030 (1894). Finally, even if councilmen were absolutely immune under state law from suit for stigmatizing a city employee, it does not follow that the employee had no federal constitutional right to a hearing to seek to clear himself of the stigma.

CONCLUSION

This case presents no departure from established law. The appellate decision was an appropriate application of the teachings of *Roth*. The stigmatizing actions in evidence are more extreme and damaging than those in any reported case found by respondent.

Respectfully submitted,

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